

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF TANZANIA AT DAR ES SALAAM CIVIL REVISION NO. 57 OF 2005

1. PATRIC MROPE
2. WAMBURA MGAYA ••• ■ •••••••• APPLICANTS VERSUS
 1. TOICO
 2. UBUNGO PETROL STATION LTD . . . RESPONDENTS Date of last order - 28/8/2007 Date of Ruling - 30/10/2007

RULING

Oriyo, J. •. The ruling is in respect of two applications for revision which have been consolidated. On 26/8/2005 Patrick Mrope and Wambura ~ Mgaya filed an application against M/S TOICO and M/S Ubungo Petrol Station. They asked this court to call for the records of the Kisutu Resident Magistrates Court in Misc. Civil Cause No. 37 of 2003 and revise it. Alongside revision was another prayer for the court to quash and set aside the trial courts order of 11/8/2005 in Objection Proceedings (the learned Mutungi, SRM, as he then was) and order the attachment of the respondents properties to satisfy the decree of 12/12/2002 granted in their favour. The application was brought under Sections 43 (2) 44 (1) (b) of the Magistrates Courts Act [Cap.11, R.E. 2002]; Sections 79 and 95 of the Civil Procedure Act, [Cap. 33, R.E. 2002]. It happened that on 18/10/2005, M/S Ubungo Petrol Station, the second respondent above, filed a similar application in this court. The application was against M/S Eric Auction Mart and Court Broker (Auctioneer), Patrick Mrope and Wambura Mgaya. This second application was assigned the same number and placed in the same file as the first one. Subsequently, the two applications were consolidated. The second application was brought under Section 79 (1) of Cap. 33 as amended by Act 25/2002 and Section 95 thereof. The applicant asked for the revision of the proceedings and orders of the trial Court in the same suit in MCC 37/2003; quash and set aside the order dated 22/8/2005. In addition to setting aside the above order requiring the second respondent to pay the Auctioneer fees for attachment and storage charges; the court is asked to order the 2 Auctioneer to immediately and without conditions release the motor vehicle attached. The brief background to the application is that the applicants , were on 12/12/2002 granted a decree in their favour against their former employer, M/S Tanzania Parking Systems Co. Ltd (TPS). It is not in dispute that TPS was dissolved in 2004. In execution of the decree against TPS; motor vehicles belonging to the respondents

were attached. The attachment was done by the Auctioneer. The respondents were not happy with the attachment of their motor vehicles to satisfy a decree against the defunct TPS. They successfully filed Objection Proceedings in the trial court. The motor vehicles were ordered to be released and that each party was to bear own costs. The ruling was delivered on 11/8/2005 and neither party preferred any appeal against it. Some ten days later, on 22/8/2005, the trial court issued an order directing the Auctioneer to Raise the Warrant of Attachment. It also directed the Auctioneer to raise the attachment "on payment of fees, if any"~ 3 On the strength of the order, the Auctioneer raised an invoice of shs.1,631,000/= against the defunct TPS being storage charges on account of the motor vehicle. The applicants contend that the Objection proceedings and decision of 11/8/2005 were irregular and illegal. Their arguments were basically three. Firstly they stated that the defunct TPS was a shareholder of the respondent companies. Secondly was that the dissolution of TPS was initiated by the Directors in order to avoid the execution of the decree of 12/12/2002 against TPS. Third was that the Directors of TPS and of the respondent companies are the same individuals; hence a justification in attaching the respondents properties. On the other hand, the respondents have no quarrel with the decision of 11/8/2005. Their bone of contention is against the order of 22/8/2005 that the Warrant of Attachment was to be raised upon payment of storage charges. They argued that after the objection proceedings were successful and the Warrant of Attachment was ordered to be raised on 11/8/2005; the trial court had no jurisdiction to issue another order on 22/8/2005. it was argued that the order of 4 22/8 was illegal because the trial court was by then functus officio. The respondents further argued that the order of payment of fees issued on 22/8/ was contrary to the earlier decision issued on 11/8/2005 that each party was to bear own costs. Let me start with the respondents complaints. They arise from the decision of 11/8/2005 last paragraph of the typed Ruling at page 4 where it is stated:- "For the above reasoning/ I .do grant the prayers in favour of the objectors as contained in the Chamber application. Save each party shall bear own costs of this application"~ (emphasis supplied) The respondents contended that after the trial court ordered on 11/8/2005 each party to bear own costs; the same court was not legally justified to order on 22/8/2005 the raising of warrant of attachment of the motor vehicle to be upon payment of the Court Brokers Fees. It was argued that the Auctioneer was a party in the Objection Proceedings where it was ordered that each party to bear own costs. So the Auctioneer was duty bound to release the 5 attached motor vehicle to the respondents free of charge. The respondents stated that under those circumstances, the trial courts order of 22/8/2005 for payment of storage fees was illegal as it contradicted its earlier decision of 11/8/2005. Further to that it was argued that because the court became functus officio after its decision of 11/8/2005; it had no jurisdiction to make the order of 22/8/2005 which rendered the latter order illegal. With due respect to the learned counsel for the respondents; it is my considered view that there are two distinct issues here. One is the issue of costs of the Objection Proceedings. These costs are statutorily provided for under Section 30 of the Civil Procedure Act. They are payable on the court's discretion. Such costs include filing fees, advocates fees, transport fees and any other costs directly incurred in the course of prosecuting or attending the matter in court. Usually such costs are subject to taxation. However, the Fees and Costs of the Court Broke/Auctioneer are distinct from the costs of the suit. Court Brokers Fees are also statutorily regulated. But the Court Brokers Costs include Auctioneers

Fees, expenses incurred in the process of attachment 6 and the storage charges. It is of notable significance that Court Broker/Auctioneers are appointed and assigned duties by courts of law. Whether the courts erred or not in issuing an attachment order; the court broker/auctioneer is not to bear no blame. Therefore; and strictly speaking, the Auctioneer was not a party in the suit except for the attachment and storage of the attached goods. The appointments, remuneration and disciplining of Court Brokers is regulated by the Rules made under SECTION 4 of the Judicature and Application of Laws Act, [Cap. 358, R.E. 2002]. The current rules have been in operation since 1997 and are titled:- The Court Brokers and Process Servers {Appointments, Remuneration and Discipline) Rules Rule 12 thereof provides for the Fees and Charges and other Allowances payable to Court Brokers for the execution of warrants of attachment and orders of sale issued by the court. Rule 12 (5) states as follows:- 7 "In case of any objection proceedings arising from the attached property¹/₂ where the objection is granted; the charges and allowances of the executing officer shall be met by the decree holder or any person or any person who pointed out those properties" (emphasis supplied) The above rule is self-explanatory and does not need any further elaboration. In the absence of a better description, I would term the costs of a suit as an order of a court issued in its judicial capacity. But the Auctioneers Fees/Charges are costs incurred pursuant to an administrative order of the court in the process of the execution of its decree to attach and/or safe keeping of the attached properties. In my considered opinion, the costs of the objection proceedings and the charges as raised by the auctioneer as storage charges have no relationship whatsoever. Therefore the order of the trial court issued on 11/8/2005 that each party bears own costs and those of 22/8/2005 that Auctioneer to raise the attachment on the payment of 8 the Auctioneers fees are both in order. Neither contradicts the other or is illegal. The order of the trial court issued on 22/8/2005 is legal and in conformity with the law. However the Auctioneer's Invoice on storage charges is not automatically payable. The Auctioneer has to comply with the conditions laid down in Rule 12 (3) of the Rules which state as hereunder:- "(3) The fees, charges and allowances payable under this rule shall be determined by the executing court and for this purpose, the executing officer, shall file his bill of costs with the court and the court shall determine the amount payable after hearing of the parties'~ (emphasis provided) It is not apparent from the record before me whether M/S Eric Auction Mart and Court Broker had complied with the above rule or not. The rule is mandatory before the Auctioneer can legally present the claim to the party liable to settle the charges. 9 Otherwise and as already stated, the respondents application has no merit and is hereby dismissed. Now back to the original applicants' case. The applicants interest is to have the court order of 12/12/2002 against TPS, satisfied. They want this court to quash and set aside the order of 11/8/2005 which allowed the objection proceedings. Instead they ask for an order that the properties of the officers of the judgment debtor, TPS; be proceeded against to satisfy the decree of 12/12/2002. Granting their prayer entails what is called in law as "lifting of the veil of incorporation of the dissolved TPS'~ (see SALOMON VS. SALOMON AND CO. (1897) A.C. 22). According to the principle of the Veil of incorporation, the law does not go behind the separate personality of the company to its members. However there are exceptions to the rule. Subject to proof, veil lifting can be done with court's leave, either where the interest of justice so demands or where there are exceptional circumstances. 10 SECTION 283 (5) of the Companies Act, [Cap.212 R.E. 2002] provides as

follows:- 't the expiration of the time mentioned in the notice the Registrar may, unless cause to the contrary is previously shown by the company, strike its name off the register, and shall publish notice thereof in the Gazette, and on the publication in the Gazette of this notice the company shall be dissolved: Provided that:-

- (a) the liability, if any, of every director, managing officer, and member of the company shall continue and may be enforced as if the company had not been dissolved'~ What the above provision means is that when a company is dissolved, its legal personality also ceases. However, the liability of the company, if any, continues and may be enforced against a 11 .• director, a managing director and a member of the company; as if dissolution had not taken place. Under the circumstances in the instant application; the applicants may proceed to file an appropriate application seeking orders of this court to lift the veil of incorporation of Tanzania Parking Systems Co. Ltd. [See Court of Appeal decision in the case of TPS Vs. Patrick Mrope and 4 others, Civil Application No. 121/ 2004, DSM unreported]. If the order is granted the applicants can then proceed against the properties of the officers as named under Section 283 (5) (a) to satisfy the trial court's decision of 12/12/2002. Otherwise the applicants have failed to point out any specific irregularities or illegalities in the Objection Proceedings and/or decision of 11/8/2005 to enable the court to grant their application of revision. In the result, the application b y the applicants has no merit and is dismissed as well. 12 In the circumstances, the two applications for revision as consolidated, fail and is dismissed. Each party to bear own costs. K.K. Oriya JUDGE 30/10/2007 Order:
1. Applications not granted for lack of merit.
 2. Auctioneers charges to be submitted to trial court for taxation.
 3. Each party to bear own costs. K.K. Oriya JUDGE 30/10/2007 13

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